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SIPDIS

STATE FOR EB/IFD/OMA, EUR/ERA, INL/C, L/LEI AND L/EB
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PASS TO US SECURITIES AND EXCHANGE COMMISSION/ENFORCEMENT/RGRIME,
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FROM USOECD

SIPDIS

E.O. 12958: DECL: 03/05/2012
TAGS: [KCOR](#) [ECON](#) [EINV](#) [ETRD](#) [PREL](#) [OECD](#)
SUBJECT: OECD: U.K.'S BRIEFING ON TERMINATED BAE/SAUDI ARABIA
FOREIGN BRIBERY CASE TO THE WORKING GROUP ON BRIBERY, JANUARY
16, 2007

Classified By: CHARGE D'AFFAIRES CURTIS STONE FOR REASONS 1.5 (B
AND D)

11. (SBU) The January 16-18, 2007 meeting of the OECD Working
Group on Bribery (WGB) included a separate session on January
16th devoted to the U.K.'s termination of an investigation into
BAE plc and a defense contract with Saudi Arabia. A condensed
readout of that session was included in an overall readout of
the January WGB plenary meeting transmitted septel. A more
comprehensive readout of the discussion is provided below.

U.K. BRIEFING

12. (C) The WGB's Acting Chair opened the discussion by
observing that the termination of the investigation appeared to
constitute a violation of the OECD Anti-bribery Convention.
U.K. delegation head Jo Kuenssberg said the U.K. recognized the
level of interest of WGB members in the case and stressed the
need to respect the confidentiality of the information contained
in the U.K.'s briefing, which elaborated on the written reply
the U.K. had provided to the WGB on January 12 in response to
the Chairman of the WGB's request for information. Kuenssberg
noted that the case would be part of the written follow-up of
the U.K.'s Phase 2 examination, scheduled for March, and
commented that the U.K. delegation had not requested that the
discussion of its decision to discontinue the BAE/Saudi Arabia
be held in restricted session (closed to non-WGB members).
Kuenssberg introduced members of the U.K. delegation, including
Jonathan Jones, Private Secretary to the Attorney General (AG);
from the Serious Fraud Office (SFO), Deputy Director Helen
Garlick, Case Controller Matthew Cowie, and Tony Farris; and
from the Ministry of Defense Police (MOD Police) Detective
Superintendent Robert Allen.

13. (C) Garlick started by underscoring the U.K. delegation's
willingness to answer as much as possible the questions of the
WGB, bearing in mind pending litigation in the U.K. Garlick

reported that SFO and MOD Police investigators had expended more than 2 million pounds sterling on the BAE investigations. She said on December 14, SFO Director Robert Wardle had decided to discontinue the joint SFO/MOD Police investigation based on his personal, independent judgment. Garlick then described four distinct parts of the BAE/Saudi Arabia investigation:

¶4. (C) First, the relationship between BAE plc and Prince Turki Bin Nasir: evidence indicated payments had been made by two subcontractors to Prince Turki, who, as Deputy Commander of the Royal Saudi Air Force during the involved period, was in a position to exert influence on the al-Yamamah contract. Payments fell into three time periods: before the implementation of the U.K.'s 2001 Act (effective February 14, 2002); during a transition period; and following full implementation of the Act. Evidence indicated that payments of up to 70 million pounds had been made to Prince Turki prior to implementation of 2001 Act. SFO had evidence indicating BAE had conspired to circumvent the 2001 Act and another 3 million pounds were paid to Turki following implementation;

¶5. (C) Second, payments made to BAE's overseas agents: evidence indicated that substantial payments were made by BAE through XXXXXX XXXXXX to marketing consultants employed at the behest of the Saudi government after implementation of the 2001 act, but no documents were produced to substantiate the provision of any genuine services by the consultants;

¶6. (C) Third, payments made under the al-Yamamah contract to an unnamed senior Saudi official: Garlick advised that in October 2005, the SFO had demanded BAE produce documents including payments related to the al-Yamamah contract. The company made representations to the AG on public interest grounds (political and economic considerations) as to why the investigation should

be halted. The AG undertook a Shawcross Exercise and sought representations from various British officials regarding the case. The SFO Director wanted to continue the investigation. On January 25, 2006, the AG agreed that there was no impediment to continuing the investigation. The SFO sought Swiss banking records regarding agents of BAE. The SFO found reasonable grounds that another very senior Saudi official was the recipient of BAE payments. The SFO was poised to travel to Switzerland in connection with its Mutual Legal Assistance (MLA) request when the decision to discontinue the investigation was made; and

¶7. (C) Fourth, potential fraud against the U.K.'s Export Credit Guarantee Department: the SFO investigated potential fraud against the EGCD and discovered false representations by BAE to conceal the corrupt dealings, which would constitute conspiracy to defraud under U.K. law.

¶8. (C) Garlick noted a number of difficult legal issues involved in the case, which put into question the sustainability of corruption charges for payments made prior to 2002. Under U.K. law, the informed consent of the principal to the agent's actions may be offered as a defense, making possible an exception to the prohibitions on foreign bribery where the individual receiving the bribe acts with the consent of the principal. Evidentiary problems were also presented in a case involving the Saudi absolute monarchy. Garlick said information was being shared within the British government with a view to the wholesale reform of UK law on corruption. She expressed concern that the BAE investigation had not concluded, but said while the Saudi Arabia case had been discontinued due to unusual/extraordinary circumstances, other investigations involving BAE activities in South Africa, Tanzania, Romania, Chile, and the Czech Republic continued.

¶9. (C) Jones cited public interest as the reason for discontinuation of the investigation, based on risks to international and national security and to the lives of U.K. citizens. He said the U.K. was not seeking to avoid giving offense to another State or harming diplomatic relations with another State, and "still less" to avoid harming British commercial interests. Jones said U.K. authorities do not

believe the Anti-bribery Convention requires parties to pursue cases if doing so would compromise the fight against terrorism or the safety of citizens. He said U.K.-Saudi cooperation was critical and that Saudi Arabia was the source of unique strains of intelligence on al-Qaida. If Saudi Arabia were to withdraw such cooperation, the UK would be deprived of a key source of information. Jones also cited UK-Saudi cooperation related to the Middle East Peace Process.

¶10. (C) Jones noted Britain had suffered one terrorist incident in July 2005 (London bombings) and other terrorism cases were under trial. He said the conviction of one suspect had occurred because of international cooperation. He noted the release of a report indicating 30 active terrorist plots in the U.K. and spoke of the real risk of terrorism at home and abroad. The SFO Director was advised of risks posed if the investigation were continued. Jones noted that if judicial review of the decision were brought, it would be defended. He said the U.K. remains fully committed to tackling international corruption and stated that the decision to discontinue the investigation was not a comfortable one. He asserted the decision was based on exceptional factors and did not set a precedent, commenting that other cases continue to be investigated. Jones said the U.K. accepts that the decision sends out a negative signal and the U.K. intends to redouble its efforts to tackle remaining cases.

WGB DISCUSSION

¶11. (C) As co-lead examiner of Britain's Phase 2 examination,

the Canadian delegation said Canada considered that prosecutorial discretion remains valid, and is not limited to a determination of sufficiency of the evidence, but also of public interest. She noted the U.K. Phase 2 report identified specific concerns regarding the U.K.'s definition of public interest (e.g. failure to exclude national economic interest or impact of relations with another State) and concerns regarding obstacles to the U.K.'s ability to start investigations of the foreign bribery offense. The Canadian delegation said nothing in the U.K.'s explanation answered these concerns. Garlick responded that prosecutorial discretion includes public interest and is guided by the Code of Crown Prosecutors, which lists matters which prosecutors may take into account in determining whether to bring prosecution. She said the list is merely guidance and does not include specific reference to obligations under the OECD Anti-Bribery Convention. She noted that in a prosecution under the common law bribery offense, with its broader definitions, the prosecutor would not face the obstacle involving the principal-agent issue, but would still have to consider the public interest.

¶12. (C) As co-lead examiner, the French delegation highlighted the Secretary General's comment that it was an important time in the life of the Convention. They noted that the systemic nature of the current case may impact future WGB work. The French del criticized the U.K.'s apparent limitation of what could be subject to prosecution (payments made before 2001), noting the issue was raised in the U.K.'s Phase 2 examination, and questioned the material nature of the cited national security grounds. The French del stressed that Article 5 of the Convention prohibits consideration of the impact on relations with another State in decisions regarding enforcement, questioned what safeguards were available to assess invocations of national security, and highlighted the impact of such a decision on reciprocal commitments under the Convention. The French delegation enquired further about the procedure used in this case, the identity of the real author of the decision, the scope of the AG review, and responsibility for assessing the public interest. The delegation sought to clarify conditions under which a decision may be reached independently, the impact of representations of ministers and technical experts on that decision, and British industry views regarding the risks posed to cooperation by continuation of the investigation. The French delegation also noted its interest in considering a Phase 2 bis examination (a second on-site evaluation of a country whose implementation of the Convention has appeared to be inadequate in practice) of the U.K. following discussions of the U.K.'s

written Phase 2 follow-up report in March.

¶13. (C) Following the Acting Chair's statement that the U.K. had conceded that considerations involving relations with another state appeared to constitute a breach of Article 5 of the convention, the UK delegation objected and stated that it did not accept that there was a breach of Article 5 in this case. The U.S. delegation took note of the experience and professionalism of U.K. delegation members. The US del inquired into what appeared to be inconsistent accounts relating to differences in views of the SFO Director and Attorney General regarding the merits of the case, reports alleging British intelligence agencies had not joined the government's assessment that the case raised national and international security interests, and whether the SFO could provide WGB members with assurances that BAE would not continue to make corrupt payments to senior Saudi officials. Garlick responded that it was her belief that SFO Director Wardle had given no credence to claims of commercial interests, jobs, or to diplomatic relations, but had been prompted solely by his belief, based on the representations of various government officials, that British lives and the lives of other nationals would be put at risk by continuing the investigation. She conceded that given the investigation was terminated before charges were brought and a

conviction obtained, there were "unpalatable economic and commercial results that will have to be resolved in another forum." She said it was an unfortunate result of a decision taken properly. Jones said there were shades of difference between the views of the AG and the SFO Director and that the AG doubted the prosecution's ability to overcome the legal hurdle regarding the principal-agent issue. In the end, Jones contended, the decision had been based on public interest considerations, rather than an assessment about the sufficiency of the evidence. Jones said press accounts reporting MI6's disagreement about the presence of national security interests in the case were incorrect and asserted that all intelligence agencies in the U.K. had agreed to the government's account finding national and international security risks present in the case.

¶14. (C) The Italian delegation commented that it was important that the WGB understood whether the decision to discontinue the investigation was based on specific information regarding the safety and security of the U.K. The Acting Chair questioned whether all international obligations should be read to imply a national security exception. If so, she questioned who would determine such an exception was merited and what safeguards existed to ensure the exception was not raised without merit. She speculated that any such exception would be invoked frequently. She questioned whether the case should be viewed as one of necessity requiring exceptional measures and commented that it was not in the interest of the WGB or of the U.K. to be seen throwing the Convention out the window. She noted the March WGB meeting would include a review of institutional issues that may have influenced the U.K. decision.

¶15. (C) Secretariat Legal advisor Niccola Bonucci noted the SFO statement did not mention that no weight had been given to the potential effects on relations with another State or the identity of legal or natural persons involved, as prohibited by Article 5 of the Convention. Garlick said she wished the SFO statement had made reference that the SFO had not considered relations with another State in reaching the decision to discontinue the investigation. She asserted that severance of diplomatic ties was never a consideration for the SFO Director. Bonucci questioned whether paragraph 10 of the U.K. delegation's written statement of January 12 regarding UK/Saudi security, intelligence and diplomatic cooperation could be distinguished from the consideration of relations with another State prohibited by Article 5. Garlick replied that the SFO drew a clear line between diplomatic cooperation generally vs. diplomatic cooperation affecting national and international security. Bonucci asked whether the U.K. had taken into account the Commentary to Article 5, which stresses prosecutors' professional judgment regarding enforcement decisions and that

such determination not be subject to improper influence prompted by concerns of a political nature. Garlick noted Director Wardle's three meetings with the U.K. ambassador to Saudi Arabia, who had a unique perspective regarding consequences of continuing the investigation, had a profound effect on his views.

¶16. (C) The Australian delegation stated that it fully supported proper prosecutorial discretion and considered valid a distinction between relations with another State and national and international security interests. The U.S. delegation commented that it was not appropriate at this juncture to conclude that Article 5 does not contemplate the proper invocation of national security interests. The WGB would hear more about the U.K. system of implementation of the Convention and this particular case in the context of the U.K.'s follow-up written review in March. As such, it appeared inappropriate to end consideration of the case prior to that further discussion or to conclude now that the case was exceptional. The Acting

Chair acknowledged that further discussion of continuing questions required follow-up. The French delegation supported the U.S. statement and reiterated continued concerns regarding the U.K.'s position on prosecution of corrupt payments made prior to 2001 and the apparent consideration of the impact of diplomatic relations with another State, clearly proscribed by Article 5. The French del requested more complete answers by the U.K. del to questions posed by the Secretariat's Legal staff and argued that the WGB should not bring the discussion to a premature end. What one party considers an exceptional security interest today may be raised by another party in the future. The WGB would need to define the limits of a national or international security interest and it was essential that this discussion continue in March.

¶17. (C) The Acting Chair noted that experience gained from this case should be taken into account in revising anti-bribery instruments, including the Revised Recommendation. She added that at the next meeting, the WGB would consider all possible appropriate actions, including a Phase 2 bis examination, if additional questions regarding the U.K.'s implementation of the Convention remained. The Acting Chair noted that the Management Group would draft a written press statement for the Working Group's consideration. The Canadian delegation expressed concern about procedures used in recent actions taken by the Chair, including issuance of press statements. While the statement of the Chair may be made in his personal capacity, he should not characterize it as reflecting the position of WGB members.

¶18. (C) During a subsequent discussion of the press statement, several other delegations commented on the U.K.'s action in this case. The Italian delegation remarked that the U.K. decision seemed to be exclusively supported by economic interests. The Chilean delegation commented on the gulf between the U.K.'s actions and the Convention. The Norwegian delegation underscored the WGB's mandate to monitor implementation of the Convention. The Netherlands, U.S., Canada, France, Switzerland, Spain, Sweden, Chile, Italy, Norway, Greece, Estonia and Argentina joined a WGB consensus that the case raised serious concerns and should be considered further in March in the context of the U.K. written follow-up review of its Phase 2 examination. They agreed that a clear public statement expressing this view, without disclosing confidential information, was necessary to maintain credibility. The German delegation joined consensus regarding concerns raised by the case and the need for confidentiality, and suggested, but did not receive support for, a weaker public statement. The Australian delegation stressed the need for further discussion of the national security issue and that the WGB had not yet reached any decision in the case, but did not block consensus on issuance of the public statement, despite an attempt by the U.K. to weaken the draft statement. A WGB public statement on the matter was issued on January 18, 2007 and posted on the OECD website.

STONE